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Supreme Court Of The United States

OCTOBER TERM, 1973

NO. 73-1713

ROBERT LEE SMYZER, SR., PETITIONER

versus

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITIONER'S REPLY MEMORANDUM

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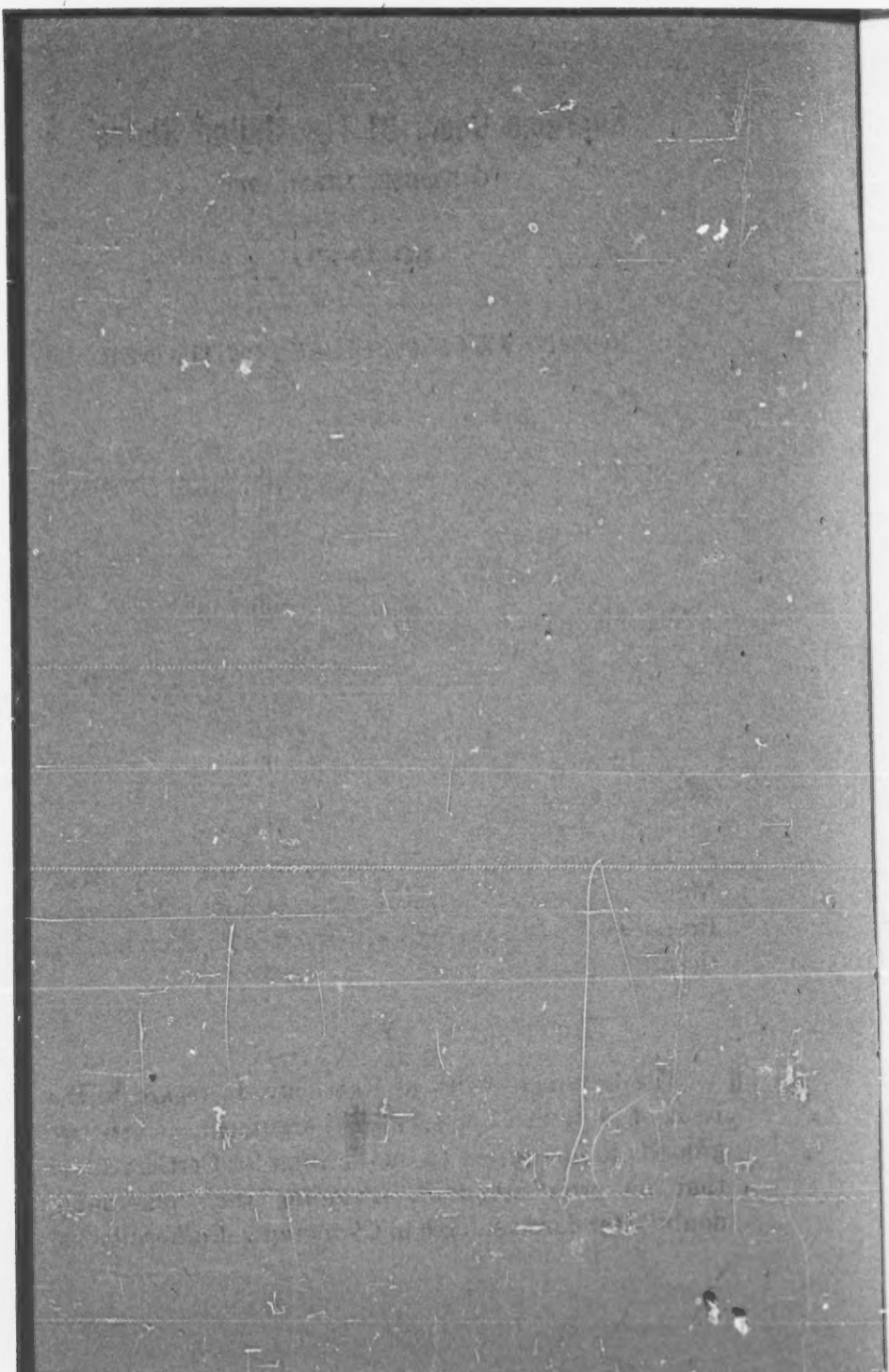

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May it please the Court:

Petitioner feels it necessary to file this Reply Memorandum to rebut certain contentions contained in Respondent's Brief in Opposition to the Petition for Certiorari.

I.

The Commonwealth of Kentucky, in regard to the issue of prejudicial prosecutorial argument, asserts two grounds in opposition to the Petition for Certiorari: (1) that no error standard, including the "reasonable doubt" standard set forth in *Chapman* v. *California*, 386

U.S. 18 (1967), should have been applied in this case because the prosecutor's closing argument contained no errors and the Kentucky Court of Appeals so ruled; (2) And that in the alternative, the *Chapman* standard was not required to be applied here as the prosecutor's statements were not violative of "substantial" constitutional rights. However, the opinion rendered by the Kentucky Court of Appeals in no way supports the Respondent's argument that the Court determined the statements and actions of the prosecutor to not be error. The Court made no such statement and in fact assessed the comments and action complained of by Petitioner as to whether they were prejudicial constituting reversible error or non-prejudicial resulting in harmless error (Appendix, p. 1a):

> "It is the opinion of the Court that there is no substantial probability that prejudice resulted from various parts of the prosecuting attorney's closing argument."

Therefore, the only pertinent issue is whether the closing argument violated Petitioner's substantial constitutional rights and requires reversal under the *Chapman* rule.

The Respondent has cited *Davis* v. *Craven*, 485 F.2d 1138 (CA 9 1973), as authority for the proposition that the errors complained of by the Petitioner were not of constitutional proportion so as to deny to Petitioner his right of due process of law. In that case, involving a petition for federal habeas corpus by a state prisoner, the United States Court of Appeals, Ninth Circuit, held in a six to five decision that the expression of a personal opinion by a state judge as to the guilt of a defendant has

not been elevated to a constitutional status. However, *Davis* is easily distinguishable from the present case. Not only is the correctness of the decision in *Davis* doubtful in light of the rule laid down by this Court in *United States* v. *Murdock*, 290 U.S. 389 (1933), and cases conforming to *Murdock*, but the *Davis* case involved a single instruction by a judge asserting opinion as to guilt, not numerous comments by a prosecutor. Also, the instruction carried with it involved cautionary remarks to the jury that the opinion given as to guilt was indeed only an opinion and was not to be used so as to compel a verdict of guilty. While the trial judge in Petitioner's case sustained defense counsel's objections to the prosecutor's mention of parole and a "gory" photograph not admitted into evidence, he did not attempt to admonish the jury that the numerous remarks, including the statement concerning other evidence in the possession of the prosecutor, were not to be considered by the jury in reaching a verdict.

This Court in *Donnelly* v. *DeChristoforo*, ____ U.S. ____, 39 L.Ed.2d 97, 94 S.Ct. ____ (1974), recently faced the issue of when prosecutorial error in a closing argument will amount to a denial of constitutional due process. Although the opinion by Mr. Justice Rehnquist in that case declared that the distinction between "ordinary trial error" and "substantive constitutional error" would continue to be observed, the majority opinion indicated that there are occasions when prosecutorial error will be raised to constitutional dimensions, and seemed to determine that decisions in such cases must be resolved by a case by case approach. This Court's review in *DeChristoforo* required the actual

consideration of only a single improper and somewhat ambiguous remark by a prosecutor, and that prosecutorial impropriety was followed by a curative instruction to the jury by the trial judge. In determining that the remark was not so misleading as to deny the defendant due process of law, this Court stated:

> "Similarly, the prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."

However, Petitioner feels that the argument in his case that prosecutorial error denied him a right to a fair and impartial trial under due process of law is much stronger than that advanced by the respondent in *DeChristoforo*. The prosecutor in the instant case committed a multiple of errors in a calculated attempt to have the jury believe that they were not receiving all of the evidence against the Petitioner, and no curative instructions were tendered by the trial judge. By advising the jury that there were other witnesses that could have been called and additional proof that might have been presented (Appendix, p. 11a-12a), the prosecutor suggested to the jury that there was other evidence which was being denied to them. The mention of a "gory" photograph of the deceased and the statement that it had been disallowed introduction into evidence not only was an attempt at inflaming the passions of the jurors, but was also again made in an effort to make

them believe that they were being deprived of important evidence (Appendix, p. 8a). Such remarks coupled with the reference to parole (Appendix, p. 5a) certainly provided the jury with a quasi moral justification for convicting the Petitioner even if they did not believe beyond a reasonable doubt that he was guilty of willful murder. This sort of calculated persuasion on the part of a prosecutor allows a jury to convict while holding doubts because they are misled into drawing inferences that if all the evidence were before them such doubts would be eliminated, and in the alternative, the defendant would never feel the full effect of their verdict, though perhaps erroneous, because of his recourse to parole. The creation of such impressions by a prosecutor—an officer of the court—goes far in diluting the standard applied in criminal cases of finding a defendant guilty only when the belief as to guilt is held beyond a reasonable doubt.

By granting the Petition for Certiorari this Court would not only have the opportunity to correct the injustice done to the Petitioner, but would also be afforded the opportunity to lay down more precise guidelines concerning prosecutorial argument. This case lends itself to review because of the calculated attempt by the prosecutor at misleading the jury and the fact that the trial judge did not see fit to even attempt to cure the false impressions and inferences created in the closing argument. We, therefore, respectfully ask this Court to grant the Petition with the firm belief that the type of prosecutorial misconduct in issue here requires the drawing of a constitutional line and the application of the doctrine set forth in *Chapman*.

II.

In the Brief in Opposition to the Petition the Commonwealth of Kentucky asserts that this Court should also not grant the Petition because the issue of the denial of the jury's request for an affidavit was not properly preserved for review. We have dealt at length with this issue in our brief and feel that we have properly shown that the Kentucky Court of Appeals was in error in not considering the merits of Petitioner's argument that he was denied the constitutional right to be present at every stage of the trial.[1]

However, the Petitioner feels that it is necessary to reply to certain portions of Respondent's argument regarding the denial of the affidavit so as to not have this Court misled as to the substance of the issue of which he seeks review. Respondent has attempted to cloud the actual issue of denial of due process of law by setting forth two erroneous propositions which unjustly bring into question defense counsel's integrity and propriety in trying to protect the rights guaranteed to his client. First, Respondent states at page 10 of its brief that the only evidence of the jury's request for the affidavit is the telephone conversation:

> "The sole evidence of this alleged request is the conversation, supposedly over the telephone, between petitioner's trial counsel and one of the jurors at petitioner's trial."

And, second, the Respondent proposes that in fact defense counsel may have never had a telephone conver-

[1] Petition for Writ of Certiorari at 18-22.

sation with Mr. McGee, the juror.[2] It is unfortunate that Respondent felt compelled to stray from the issue at hand in his over-zealous efforts in arguing the case for the Commonwealth and so maliciously attack the truth and veracity of defense counsel. Neither the trial judge in the Hearings on the Motion for New Trial (Appendix p. 15a-23a) nor the Kentucky Court of Appeals in its opinion (Appendix p. 1a-3a) ever challenged the word of defense counsel as to the existence of the telephone conversation. And, more important, there is no question that the jury requested the affidvait, for the trial judge admitted at the Hearing, Motion for New Trial, March 16, 1973 (Appendix p. 14a), that he personally had knowledge that such a request by the jury had been made:[3]

> MR. HADDAD: *I didn't know the jury had asked for the affidavit that Kenny gave.*
>
> THE COURT: *Well, they asked for the copy of the affidavit.*
>
> MR. HADDAD: I think if they asked for it they should have been entitled to have it, you know, read back to them, Judge. As I say, I didn't even know that during the deliberations that they had asked for it, or I would have raised it at that time. I didn't know it until this guy here told me. But I just throw that out because it would be another reason we didn't put in the motions and grounds for a new trial, because it came up after we had filed it. I think we've got some right sharp points in the brief. (Emphasis Added)

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[2] Brief for Respondent in Opposition at 12-14.

[3] That portion of the transcript reprinted in the Appendix in which the trial judge admitted having knowledge that the jury had requested the affidavit was cited in the Petition for Certiorari at p. 19.

Thus, by the trial judge's own admission that the jury's request had actually occurred and was within his personal knowledge he could, and in fact did, properly rule on this ground presented along with others in the Motion for New Trial (Appendix p. 15a-16a). And, in turn, because the trial court had knowledge of the request prior to overruling the Motion for New Trial and was presented with the opportunity to right the wrong by granting Petitioner a new trial, the Kentucky Court of Appeals should have made a determinative ruling on the substance of the issue.

Finally, the Respondent states that this Court should consider Kentucky's Rules of Criminal Procedure which prohibit impeaching a jury's verdict except when such a verdict is made by lot.[4] But again, the Respondent is not speaking to the issue at hand. Petitioner recognized that this rule exists in his extensive briefing of this case when it was before the Kentucky Court of Appeals. However, Petitioner does not wish to attempt to impeach the jury's verdict in bringing his petition. Rather, he raises only the issue of whether he was denied due process of law by being deprived of the right to be present at every stage of his trial.

We, therefore, respectfully ask this Court to grant the Petition for Certiorari in order to consider the questions presented by the Petitioner, not the confusing collateral issues raised by the Respondent. Petitioner sincerely believes that a resolution by this Court of the

[4] Brief for Respondent in Opposition at 14-15.

questions he has presented in the Petition would serve to promote the fair administration of criminal justice.

Respectfully submitted,

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Of Counsel:
KENNY GRANTZ